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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 495

UNITED STATES OF AMERICA,
Petitioner,

v.

COMMODORE PARK, INCORPORATED,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

MEMORANDUM FOR RESPONDENT

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THE RELIANCE PRESS OF NORFOLK, VA., INC.

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OPINIONS BELOW

The opinion of the District Court appears in the Record at pages 15 to 43 inclusive. Its findings of fact pertinent to this cause are consolidated at pages 40 and 41, and its conclusions of law at pages 42 and 43. The opinion of the Circuit Court of Appeals is in the Record at page 50.

QUESTION PRESENTED

The question presented is not limited to whether the United States, when it deepens a portion of one navigable body of water by dredging operations undertaken in aid of navigation, may deposit the dredged material in another tributary body of navigable water without compensating riparian owners for the attendant loss of the *right of access to deep water,* as stated in the petition filed by the Solicitor General. The question is rather, whether the United States, when it deepens a portion of a body of navigable water by dredging operations having as their object the furtherance of National Defense, may deposit the dredged material in another body of navigable water tributary to the first, and thereby completely fill the second body of navigable water to a distance inland approximately two miles above its natural outlet, deposit mud and silt on the area which had formerly constituted the shore of the riparian owner, leave only a shallow stagnant pond or drain adjacent to that shore, and escape liability upon the contention that because its dredging operations served to deepen the water at the point where the dredging was done, both the initial dredging and the ultimate deposit at a point remote therefrom were done to meet the needs of commerce and to improve navigation as an incident thereof.

STATEMENT

Beginning in 1940, the Navy Department proceeded to enlarge its Naval Operating Base at Norfolk, and particularly the aviation shore facilities at the Naval Air Station which was then located on the West

side of Mason's Creek and the South side of Willoughby Bay. To accomplish this purpose it contracted with Virginia Engineering Company for a project entitled "Aviation Shore Facilities" which called for the construction of "bulkheads, dredging, and fill, and preparation of landing field", as well as the erection of certain structures, changes in the location of roads, pipe lines and the like, at a total estimated cost of $13,700,000.00. A part of the work to be performed under the contract was the dredging of Willoughby Bay from its then existing depth to depths of ten to fourteen feet below mean low water so as to provide sufficient depths for large patrol sea planes (R. 51). Willoughby Bay was closed to navigation for vessels other than Naval craft, and Mason's Creek was permanently closed to all navigation. The United States proceeded to condemn all the remaining land on the West side of Mason's Creek (lying South of the land which it already owned) to the headwaters thereof, as an addition to the Naval Station on this side of the Creek, and also condemned nearly all of the land on the East side of the Creek except the land of the respondent, none of which was condemned. Condemnation proceedings took place in 1940, 1941 and 1942, and included some two thousand acres of land. In the course of the dredging operations 18,000,000 cubic yards of mud and silt were taken from the bed of Willoughby Bay and deposited in the creeks and the condemned areas South of Willoughby Bay. Mason's Creek was filled to a point near the respondent's land, and a retaining wall was constructed. For this distance the natural channel of the creek, which was about 550

feet wide at the mouth, was filled from side to side and to a height equal to the highest point of the adjoining land; and immediately opposite the land a pond or sink was left. (R. 52). The result was that the riparian rights appertaining to the land in its prior condition, including (but not limited to) the right of access to the navigable waters of the Creek and the Bay, the utilization of the Creek in its natural condition, and the advantageous surroundings which it contributed to the adjoining property, were destroyed. (R. 52). By filling and closing Mason's Creek all of plaintiff's riparian rights were permanently taken. The part of Mason's Creek not filled was converted into a lake without any outlet, sewers and surface drainage emptied therein and the water became stagnant and filthy. The water used in conveying through pipes the dredged materials from the Bay to the parts of Mason's Creek filled, overflowed the bulkheads and dykes and carried great quantities of mud and silt into the parts of Mason's Creek not filled, and much of it settled along the shore and to a substantial depth on plaintiff's land lying between high and low water marks, and permanently converted that land into undesirable spongy mud bottom. (R. 53). The District Court further found that there had been an actual invasion of respondent's property creating a condition of permanent damage. (R. 40).

DECISIONS BELOW

The District Court held that the project was not in aid of navigation and that the damaging consequences to respondent did not result from Govern-

mental action in aid of commerce, or in Governmental action in aid of navigation as an incident of commerce. (R. 42).

The Circuit Court of Appeals held that the dredging operations in Willoughby Bay did relate to commerce and navigation as an incident thereof, but that the deposit in Mason's Creek of the material dredged from Willoughby Bay had no relation to navigation or commerce; that the deepening of the one body of water and the fill in the other were not integral and related parts of a single enterprise (R. 56); that the filling (and closing) of Mason's Creek did not in anyway serve the interest of commerce or navigation. (R. 57). Accordingly, it affirmed.

ARGUMENT FOR DENIAL OF WRIT

It must be remembered that the dominant power of the Federal Government over navigable streams emanates from Article I, Section 8, Paragraph 3 of the Constitution, and is to be exercised for the assistance or regulation of commerce. The improvement of navigation is but an incident of the assistance or regulation of commerce.

In *United States v. Appalachian Electric Power Company*, 311 U. S. 377, 426, this Court said:

> "In truth the authority of the United States is the regulation of commerce on its waters. Navigability, in the sense just stated, is but a part of the whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of control. As respondent soundly argues, the United States cannot by calling a project

> of its own 'a multiple purpose dam' give to itself additional powers, but equally true the respondent cannot, by seeking to use a navigable waterway for power generation alone, avoid the authority of the Government over the stream. The authority is as broad as the needs of Commerce."

While Congress in the exercise of the power to alter the natural condition of navigable waters for the needs of commerce may adopt, in its judgment, any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, it may not arbitrarily destroy or impair the rights of riparian owners by legislation (nor by action without legislation) which has no real or substantial relation to the control of navigation or appropriateness to that end. (Opinion CCA R. 58). It is to be noted at the outset that neither the filling of Mason's Creek, nor even the dredging of Willoughby Bay, resulted from the adoption by Congress of a program which had a relation to the needs of commerce or the improvement of navigation in aid thereof, nor did it originate with the Secretary of War or Chief of Engineers to whom are delegated the general responsibility for changes supporting the needs of commerce. There was never any claim or pretext that such was the origin of this project, but on the contrary it resulted solely from the determination of the Navy Department that certain additions to Aviation Shore facilities were requisite, and the deepening of the water in Willoughby Bay was but one incident of such major purpose. The comprehensive conclusions of the District Court seem eminently sound, but under the

more limited conclusions of the Circuit Court of Appeals the result is the same. This respondent's riparian rights which were here taken by the United States are property rights. *Mullins v. Morgan,* 176 Va. 201; *Hite v. Town of Luray,* 175 Va. 218; *Yates v. Milwaukee,* 10 Wall. 497, 504.

To conclude that such taking under the circumstances of this case has a direct relation to the needs of commerce or improvements in navigation in aid thereof, is to deny the obvious, but even if this court should so conclude, it does not follow that respondent should be deprived of compensation for this, its property. The property of this respondent here taken was not an *obstruction* which it had placed in the bed of a navigable stream, as a dam, pier or lock, the removal of which was essential to the deepening or widening of the stream. In such a situation respondent would not be entitled to compensation. Neither was it an earthwork, embankment or structure which respondent had erected on its land lying between high water mark and low water mark, which had been caused to overflow by changes in the natural condition of the stream made in aid of navigation. Again in such a situation this respondent would not be entitled to compensation. The property right taken from this respondent was the right to enjoy its real property in the natural condition of that property, including the natural condition of the water course on which the property bordered, and to realize the benefits which such natural condition of land and water permitted.

When the many decisions of this court on the general subject are examined with respect to the facts

presented in each particular case, there is no conflict in them, and the principles which have been established stand out clearly. Thus under the line of decisions of which *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, is the leading case, and *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, perhaps the most recent, it is uniformly held that private owners of obstructions which have been placed in navigable streams are not entitled to compensation for the removal or destruction of these obstructions in the improvement of navigation.

There can be no doubt that the dominant power of the United States to improve navigation in aid of commerce extends to the removal of privately owned obstructions placed in navigable streams, without the payment of compensation. This is because any one placing an obstruction (such as a pier, abutment, dam, lock, or similar structure) in a stream or water course, either under State or Federal permissive authority, is chargeable with knowledge that the United States has the power to, and may at any time, change the condition of that stream to assist the needs of commerce. Any property right which such person acquires in a structure created by him is subject to the superior right of Government when exercised for the purpose stated.

Again, as in *United States v. Chicago M. St. P. & P. R. R. Co.*, 312 U. S. 592, a riparian owner who has constructed an embankment or railroad line, earthwork, or other structure on his shore between high water mark and low water mark, is not entitled to compensation when changes in the stream in aid of navigation result in flooding his structure. This is because

the property right which the riparian owner has in the area between high water mark and low water mark is no stronger than the property right which he has in the bed of the adjoining stream, so far as changes in the condition of that stream in aid of commerce are concerned, and his property right in that area is subordinate to the power of Government exercised to meet the needs of commerce.

But it is equally well settled by the decisions of this court that changes in the natural condition of a navigable stream occasioned by, or resulting from work conducted by the United States in aid of navigation (as dredging, or the erection by the Government of dams, locks and abutments) which proximately cause a damage to a riparian owner in his ownership of real property located above natural high water mark, constitute to that extent a taking of his property in the public interest, for which just compensation must be paid. *United States v. Cress,* 243 U. S. 316; *Jacobs v. United States,* 290 U. S. 13, 78 L. ed. 142; *Farnum, "Law of Waters and Water Rights",* 1904, Sec. 134; *Goodman v. United States* (CCA 8th, 1940), 113 Fed. (2d) 914.

The case of *United States v. River Rouge Imp. Co., et al.,* 269 U. S. 411, is of peculiar interest and primary importance as a precedent. There Congress made an appropriation for improvement of navigation in the Rouge River in Michigan, in aid of commerce, and the United States proceeded by condemnation to acquire certain property of riparian land owners in order to widen the stream. The quantity taken from the riparian owners did not constitute the whole of the

tracts owned by them, and the United States contended that the remaining property was benefitted by this widening and improvement of the stream. It asked the trial court to charge the jury that the value awarded for the property taken must be reduced by the value of such benefit. The trial court recognized the right of the United States to the deduction of such special benefits, but in charging the jury stated that the Government had absolute power of control over navigable streams, and the right to deprive any riparian owner of all access to the navigable portion of the stream; that since the right of access was subject to the absolute power of control by the Government the jury could not make any deduction for benefits on the theory that the improvement would increase the value of any property right in connection with the access to or use of the river, or bring the owner any new or different right of access and use for purposes of navigation, and that the jury should keep "always in mind the uncertainty of securing from the Government the privilege to enjoy these advantages, and the limited character of whatever advantages may be so secured." The United States excepted to the charge and took the appeal, asserting that its rights were not absolute but qualified, and limited to the control for the purpose of improving navigation for the benefit of commerce, *and that where the accomplishment of this purpose went beyond the removal of obstructions from the stream the owner was entitled to compensation for any property right of which he was deprived,* but such compensation was subject to reduction by the value of any benefit conferred on property which remained in him. It was so

held. In an opinion by Mr. Justice Sanford, this Court said:

> "This right of a riparian owner, it is true, is subordinate to the public right of navigation, and subject to the general rules and regulations imposed for the protection of such public right. And it is of no avail against the exercise of the absolute power of Congress over the improvement of navigation, if Congress determines that the continuance is detrimental to the public interest in the navigation of the river. United States v. Chandler-Dunbar Water Power Co., 229 U. S. 62, 57 L. ed. 1075, 1078, 33 Sup. Ct. Rep. 667.
>
> "The right of the United States in the navigable waters within the several states is, however *'limited to the control thereof for the purposes of navigation.'* Seattle v. Oregon & W. R. Co., 255 U. S. 56, 63, 65 L. ed. 500, 506, 41 Sup. Ct. Rep. 237. And while Congress, in the exercise of this power may adopt, in its judgment, any means having some positive relation to the control of navigation and not otherwise inconsistent with the Constitution, United States v. Chandler-Dunbar Water Power Co., 229 U. S. 62, 57 L. ed. 1075, 33 Sup. Ct. Rep. 667, *it may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end.* In Yates v. Milwaukee, 10 Wall. 504, 19 L. ed. 986, it was said in reference to the rights of a riparian owner on a navigable stream: 'This riparian right is property and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired.' This

language was cited with approval in Illinois C. R. Co. v. Illinois, 146 U. S. 445, 36 L. ed. 1039, 13 Sup. Ct. Rep. 110." (Italics supplied).

CRITICISM OF PETITIONER'S CASES

At pages 8 to 15 of his petition, the Solicitor General, in support of his assertion that the writ should be granted, cites certain authorities which we do not think are apposite.

In *Greenleaf Lumber Co. v. Garrison,* 237 U. S. 251, by making an appropriation for that purpose Congress determined to widen the channel of the Elizabeth River, in consequence whereof the Secretary of War caused the Port Warden's line to be re-established nearer inshore on the East side of the river, and then required the Lumber Company to remove from the bed of the river that portion of its pier (the outer end) between the old and new Port Warden's line. The subject property was an obstruction in the bed of the stream which had been placed there by the riparian owner. An inducing motive for widening the stream was to afford Naval vessels proceeding to the Portsmouth Navy Yard a wider area in which to turn. The Lumber Company claimed that because this was the motive it could not be required to remove its pier, but the project contemplated an improvement in navigation facilities available to and continuously used by commercial vessels of all types, as well as Naval vessels. The determination was that the change was required for the needs of commerce, and such determination had been made by Congress. The decision of the court, requiring the removal of the obstruction and recognizing that the owner was not entitled to any compen-

sation for its loss, was in no sense a departure from previously and subsequently announced principles.

South Carolina v. Georgia, 93 U. S. 4, is clearly distinguishable because there one of two channels in the same stream was filled to improve navigation in the other channel in that stream, as has been pointed out in the opinion of the Circuit Court of Appeals (R. 56); and for the further reason that in that case the only detriment to the riparian owner was in his use in navigation of a part of the stream.

In *Scranton v. Wheeler,* 179 U. S. 141, and *Gibson v. United States,* 166 U. S. 269, the obstructions had been placed in a portion of a navigable stream by governmental authority and were themselves in aid of commerce. These obstructions made no change in the physical condition of the riparian owner's property or the water bordering it, and affected its usability only because they interfered with movement by boat from the upland to the open portion of the waterway. It cannot be here said that the only effect of filling Mason's Creek from side to side to the level of the adjoining upland was to prevent respondent's navigation of that stream, nor that the Government's object in putting the fill in Mason's Creek was to aid commerce in or over the creek.

Bailey v. United States, 62 C. Cls. 77, certiorari denied, 273 U. S. 751, in no sense presents a parallel situation. There the party seeking compensation was not even a riparian owner and had no property right in the natural condition of the watercourse, but he sought to recover for the value of oysters which he had placed in the bed of a navigable stream when those

oysters were covered by deposit from a dredging o
ation. His right to have the oysters in the bed of
stream was acquired under lease of oyster ground f
Virginia, and was servient to the right to remov
destroy an obstruction in widening or deepening
stream. In no sense is the case at bar in conflict
the Bailey case, nor is the decision of the Cour
Claims a departure from the principles which
been here applied.

The Solicitor General attempts to find sup
in the opinions of two past Attorneys Generals, wr
respectively in 1899 and 1910, and contained in
Op. A. G. 646, and 28 Op. A. G. 433. It is per
sufficient to say that as ex parte expressions these
entitled to little weight, and to note that the observa
of the Circuit Court of Appeals on the first of t
opinions is equally applicable to both (R. foot
p. 57).

Finally, it is urged as a reason for granting
tiorari that five similar complaints have been file
the District Court on which decision has been
poned awaiting the outcome of this case, and it is
that additional action may be expected from other
owners on Mason's Creek. With equal propriety
may say that it has been more than two years since
damage was occasioned to this respondent, and s
this action was instituted, and it may be reason
supposed that all others situated similarly to the
spondent are covered in the pending actions. It is
tremely unlikely that the United States will ever fo
a similar course at any other location, and as the p
ciples involved are not novel and there is no se

reason to question the result reached in the Circuit Court of Appeals, it is submitted that further review is not warranted.

CONCLUSION

For the reasons stated herein and on the authorities cited, it is respectfully submitted that the application for a writ of certiorari should be denied.

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